IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A353/2007

DATE: 8 FEBRUARY 2008

In the matter between:

PIETER ANDREW STACKLING Appellant

and

THE STATE Respondent

JUDGMENT

ZONDI, J:

[1] The appellant appeared in the Worcester district court on 26 March 2007 facing a charge of assault with intent to do grievous bodily harm. It is alleged in the charge sheet that on 6 February 2007 he unlawfully and intentionally assaulted one Hendrika Stackling with a bin with intent to cause her grievous bodily harm. The appellant appeared in person and conducted his own defence. Today the appellant appears in person.

[2] The appellant pleaded not guilty to the charge but was convicted and sentenced to a fine of R600 or three

months' imprisonment which was wholly suspended on the normal conditions. With the leave of the Court *a quo* the appellant now appeals to this Court against both conviction and sentence.

[3] I may mention that the appellant was late in filing his heads of argument and made an application for condonation. The State does not oppose that application and the application for condonation is granted.

[4] The appellant attacks the conviction on the ground that the State had failed to prove beyond reasonable doubt that he had assaulted the complainant with intent to cause her grievous bodily harm. The evidence which had been presented by the complainant and which formed the basis of the appellant's conviction was to the following effect.

[5] On or about 6 February 2007, the appellant and the complainant – who is his ex-wife – had attended a maintenance enquiry at the Worcester Maintenance Court. A heated argument ensued between the appellant and his ex-wife resulting in the appellant picking up a bin and aimed it at his ex-wife. There was a dispute as to whether the appellant had threw the bin at the

complainant. According to the appellant he had merely picked it up with an intent to throw it at the complainant but did not do so because his cousin who was with him at the time remonstrated with him, telling him to stop it. He put the bin down without having carried out his intention.

[6] The complainant testified that she did not sustain any injury as a result of being hit with the bin as the appellant's cousin shouted at the appellant to stop. The Court *a quo* found the complainant to have been a good and credible witness and did not find any fault in her evidence. It rejected as improbable the appellant's version. The basis of its rejection of the appellant's version is to be found in the following statement::

> "Waarom sal die beskuldigde nou terwyl hy kwaad is en terwyl hy is - in sy hart voel en haar aan te rand net die (onduidelik) gryp en (onduidelik)"

[7] The issue before us is whether the evidence led before the trial Court justified a rejection of the appellant's version on the basis that it was not reasonably possibly true. The approach followed by the trial Court in convicting the appellant was incorrect. The trial Court rejected the appellant's version on the basis that it was

improbable. This is a wrong approach and it constitutes a misdirection. In S v Shackwell 2001(2) SACR 185 (SCA), the Supreme Court of Appeal cautioned against the rejection of an accused's version simply because it is improbable. There Brand, AJA (as he then was) said at 194g-i:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond a reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that in view of the standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the Court must decide the matter on the acceptance of that version.
>
> Of course, it is permissible to test the accused's version against the inherent probabilities but it cannot be rejected merely because it is improbable, it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true".

Similarly, it has been held by the Court in S v Ipeleng 1993(2) SACR 185 (T) at 189 b:

> "Even if the Court believes the State witnesses, it does not automatically follow that the appellant must be convicted. What still needs to be examined is whether there is a reasonable possibility that the evidence of the appellant might be true. Even if the evidence of the State is not rejected, the accused is entitled to an acquittal if the version of the accused is not proved to be false beyond reasonable doubt. (See in this regard S v Kubeka 1982(1) SA 534 (WLD) at 537E; R v M 1946 AD 1023 - at 1027)."

[8] Because of the misdirection to which I have referred in this matter, this Court is at large to disregard the magistrate's finding of facts even if based on credibility, and to come to its own conclusion on the record as to which the guilt of the appellant was proved beyond a reasonable doubt and the *onus* accordingly become all-important (R v Dhlumayo & Another 1948 (2) SA 677 AD at 705B). Even accepting the magistrate's finding that the complainant was a good witness, there is simply no

basis for rejecting the version of the appellant. The appellant should have been acquitted.

[9] In the result I would uphold the appeal against both conviction and sentence. The conviction and sentence of the appellant are set aside.

ZONDI, J

VAN STADEN, AJ: Ek stem saam.

VAN STADEN, AJ